

IN THE COURT OF COMMON PLEAS  
FAIRFIELD COUNTY, OHIO

STATE OF OHIO,

Plaintiff(s),

vs.

CITY OF COLUMBUS et al,

Defendant(s).

Case No. 2022 CV 00657

Judge Richard E. Berens

**OPINION AND ENTRY REGARDING  
MOTION FOR PRELIMINARY  
INJUNCTION**

FILED  
2023 JAN 20 AM 9:23  
BRANDEN C. MEYER  
CLERK OF COURTS  
FAIRFIELD CO. OHIO

This matter came to be heard upon Plaintiff State of Ohio's motion for a preliminary injunction pursuant to Civ.R. 65(B). A hearing was held on this matter on January 12, 2023, and both parties submitted pre- and post-hearing briefs. In considering the arguments of the parties and the evidence presented in this matter, for the reasons set forth below, the Court finds Plaintiff's motion for a preliminary injunction not well-taken, and it is hereby DENIED. The temporary restraining order issued in this case shall expire at midnight on January 20, 2023, pursuant to the terms of the extension agreed to by Defendants.

**Background**

On December 14, 2022, Plaintiff initiated this action challenging certain ordinances adopted by the Defendant City of Columbus on December 5, 2022. Plaintiff alleges that Columbus City Code Sections 2323.191, 2323.32, 2323.11(N), and 2323.321 ("the Columbus City Firearm Ordinances") violate the Ohio Constitution<sup>1</sup>. Plaintiff's complaint seeks a preliminary and permanent injunction enjoining the enforcement of the Columbus City Firearm Ordinances as well as other relief.

<sup>1</sup> Plaintiff's Amended Complaint also presented a second cause of action based on Ohio Revised Code Section 9.68. The Court, however, previously dismissed this cause of action. See Jan. 5, 2023 Opinion and Entry Regarding Defendant's Motion to Dismiss.

The Court granted Plaintiff's Application for a Temporary Restraining Order on December 15, 2022, and on December 28, 2022, extended the Temporary Restraining Order until January 12, 2022, to allow the Court to address Defendants' motion to dismiss that challenged the Court's jurisdiction to hear this matter. Said motion was granted in part and denied in part on January 5, 2023, and this matter proceeded to a hearing on Plaintiff's motion for a preliminary injunction on January 12, 2022. At the hearing, Defendants consented to the extension of the Temporary Restraining Order until January 20, 2022.

### **Evidence Presented**

A hearing on the Plaintiff's motion was held on January 12, 2022. Counsel for both Plaintiff and Defendants appeared before the Court. The State presented argument to the Court, and offered five exhibits:

Plaintiff's Exhibit 1 (Admitted) – Decision in the case of *James Miller, et al., v. Rob Bonta, in his official capacity as Attorney General of the State of California, et al.*, United States District Court for the Southern District of California Case No. 19-cv-1537-BEN;

Plaintiff's Exhibit 2 (Not Admitted) – Digital article "Another Ban on 'High Capacity' Magazines?";

Plaintiff's Exhibit 3 (Not Admitted) – Digital article "Children and the Civil War";

Plaintiff's Exhibit 4 (Not Admitted) – Brochure "Ohio 4-H Shooting Sports";

Plaintiff's Exhibit 5 (Not Admitted) – Digital article "League Adds Sporting Clays and 5-Stand Clay Target Disciplines".

Defendants presented argument and the following the testimony and exhibits:

Testimony of City of Columbus Deputy Police Chief Smith Weir;

Testimony of Franklin County Assistant Prosecuting Attorney John Gripshover;

Defendant's Exhibit A (Admitted) – Certified Copy of the Ordinance No. 3176-202 (the Columbus City Firearm Ordinances).

## Law and Analysis

Plaintiff seeks a preliminary injunction to enjoining the application of Columbus City Code Sections 2323.11(N); 2323.191(B)(1) and (B)(2); 2323.32, and 2323.321. These ordinances provide:

2323.11 – Definitions.

\* \* \*

(N) "Large capacity magazine" means any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, thirty (30) or more rounds of ammunition for use in a firearm. A "large capacity magazine" does not include any of the following:

- (1) A feeding device that has been permanently altered so that it cannot accommodate more than thirty rounds of ammunition;
- (2) A .22 caliber tube ammunition feeding device;
- (3) A tubular magazine that is contained in a lever-action firearm;
- (4) A magazine that is permanently inoperable.

\* \* \*

2323.191 Negligent Storage of a Firearm.

(A)(1) No person shall negligently store or leave a firearm in a manner or location in the person's residence where the person knows or reasonably should know a minor is able to gain access to the firearm.

(2)(a) This section does not apply to a person who stores or leaves a firearm in the person's residence if the firearm is kept in safe storage.

(b) This section does not apply to a person who stores or leaves a firearm in the person's residence if a minor gains access to the firearm as a result of any other person's unlawful entry into the person's residence.

(B)(1) Whoever violates this section is guilty of criminally negligent storage of a firearm. Except as provided in divisions (B)(2) or (B)(3) of this section, criminally negligent storage of a firearm is a misdemeanor of the fourth degree.

(2) If a minor gains access to a firearm as the result of a violation of this section, except as provided in division (B)(3) of this section, a violation of this section is a misdemeanor of the third degree.

\* \* \*

#### 2323.32 - Unlawful possession of a large capacity magazine

(A) No person shall knowingly possess, purchase, keep for sale, offer or expose for sale, transfer, distribute, or import a large capacity magazine.

(B)(1) This section does not apply to either of the following:

(a) An officer, agent, or employee of this or any other state, a political subdivision of this or any other state, or the United States; members of the armed forces of the United States or the organized militia of this or any other state; and law enforcement officers to the extent that the officer, agent, employee, or member is authorized to possess, purchase, keep for sale, offer or expose for sale, transfer, distribute, or import large capacity magazines and is acting within the scope of the officer's, agent's, employee's, or member's duties;

(b) Any person who is employed in this state, who is authorized to carry concealed weapons or dangerous ordnances or is authorized to carry handguns, and who is subject to and in compliance with the requirements of section 109.801 of the Revised Code, and is acting within the scope of the employee's duties unless the appointing authority of the person has expressly specified that the exemption provided in division (B)(1)(b) of this section does not apply to the person;

(2) This section does not apply to a large capacity magazine which belongs to a firearm or which is possessed by the owner of a firearm which is registered with federal authorities under the National Firearms Act (26 U.S.C.A. Secs. 5801-5871) or has been rendered totally inoperable or inert and the firearm cannot be readily rendered operable or activated and which is kept as a trophy, souvenir, curio or museum piece.

(3) This section does not apply to importers, manufacturers, and dealers of large capacity magazines that are licensed under the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 923, and any amendments or additions thereto or reenactments thereof;

(4) This section does not apply to carriers, warehouses, and others engaged in the business of transporting or storing firearms for hire, with respect to large capacity magazines lawfully transported or stored in the

usual course of business and in compliance with the laws of this state and applicable federal law.

(C) Whoever violates this section is guilty of unlawful carry or possession of a large capacity magazine, a misdemeanor punishable by up to one year in jail with a mandatory minimum jail term of at least one hundred eighty (180) consecutive days during which mandatory jail term the defendant shall not be eligible for work release and up to a \$1500 fine.

(D) It is an affirmative defense to a violation of this section that the person knowingly possessed, kept for sale, transferred, distributed, or imported a large capacity magazine solely for the purpose of transporting the large capacity magazine in a motor vehicle for an otherwise lawful purpose through the municipal limits of the city. This defense shall only apply if the large capacity magazine is not on the actor's person or within the passenger area of the motor vehicle.

(E) Any instrumentality that has been used in a violation of this section shall be seized and is subject to forfeiture pursuant to Chapter 2981 of the Ohio Revised Code.

2323.321 Alternate large capacity magazine provision if Ohio Revised Code Section 9.68 is reinstated.

If a court of competent jurisdiction reinstates Ohio Revised Code Section 9.68 which governs the regulation of firearms by a political subdivision or if the definition of "Large capacity magazine" in Section 2323.11 of the Columbus City Codes is declared by a court of competent jurisdiction to be unconstitutional or otherwise invalid, then the definition of a "Large capacity magazine" under Section 2323.11 shall be as follows:

"Large capacity magazine" means any magazine, belt, drum, feed strip, clip or other similar device that has the capacity of, or can be readily restored or converted to accept, one hundred (100) or more rounds of ammunition for use in a firearm other than a handgun. A "large capacity magazine" does not include any of the following:

- (1) A feeding device that has been permanently altered so that it cannot accommodate more than one hundred rounds of ammunition;
- (2) A .22 caliber tube ammunition feeding device;
- (3) A tubular magazine that is contained in a lever-action firearm;
- (4) A magazine that is permanently inoperable.

The decision as to whether or not to grant a preliminary injunction is vested in the sound discretion of a trial court. *Dexxon Digital Storage, Inc. v. Haenszel*, 5th Dist. No. 04CAE11074, 161 Ohio App.3d 747, 2005-Ohio-3187, 832 N.E.2d 62, ¶ 32. The standard for the issuance of a preliminary injunction is clearly established. The Fifth District Court of Appeals has noted that “[a] party seeking a preliminary injunction bears the burden of establishing, by clear and convincing evidence, that ‘(1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction.’” *McHenry v. McHenry*, 5th Dist. No. 2016CA00158, 2017-Ohio-1534, 88 N.E.3d 1222, ¶ 21, quoting *AultCare Corp. v. Roach*, 5th Dist. Stark No. 2008CA00287, 2009-Ohio-6186, 2009 WL 4023210, ¶ 56.

As to these factors, “[n]o one factor in the analysis is dispositive, but the four factors must be balanced as is characteristic of the law of equity.” *McHenry* at ¶ 21. A strong showing on one factor may offset a weak showing on a different factor:

All factors in favor of a stay do not necessarily have to be of equal weight: “[T]he factors are balanced, such that a stronger showing on some of these prongs can make up for a weaker showing on others.” *Ohio Valley Environmental Coalition, Inc. v. United States Army Corps of Engineers*, 890 F.Supp.2d 688, 692 (S.D.W. Va. 2012), citing 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, Section 3954 (4th Ed.2012). Therefore, likelihood of success on the merits can make up for a less weighty factor of irreparable harm. So, for example, in the context of preliminary injunctions, in circumstances in which ‘there is a strong likelihood of success on the merits, an injunction may be granted even though there is little evidence of irreparable harm [if an injunction is not granted] and vice versa.’ *Fischer Dev. Co. v. Union Twp.*, 12th Dist. Clermont No. CA99-10-100, 2000 WL 525815, \*3 (May 1, 2000); see also *Southwestern Ohio Basketball, Inc. v. Himes*, 2021-Ohio-415, 167 N.E.3d 1001, ¶ 33 (12th Dist.).

*Davis v. McGuffey*, 167 Ohio St.3d 1442, 2022-Ohio-2163, 189 N.E.3d 806, ¶ 17.

Plaintiff is required to carry its burden on these factors by clear and convincing evidence. “Clear and convincing evidence is that measure or degree of proof which will

produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954).

1. *Is there a substantial likelihood that the plaintiff will prevail on the merits?*

To be entitled to a preliminary injunction, Plaintiff must show that it has a substantial likelihood of success on the merits of Plaintiff's claim for a permanent injunction. *McHenry* at ¶ 21. Plaintiff's cause of action presents a facial challenge to the constitutionality of the Columbus City Firearm Ordinances; Plaintiff's argument is that the Columbus City Firearm Ordinances violate Ohio's constitutional guarantee that "[t]he people have the right to bear arms for their defense and security..." Ohio Constitution, Article I, Section 4. Plaintiff's likelihood of success on this claim is largely dependent on the framework utilized to analyze this claim.

The parties are diametrically opposed to one another as to the test to be applied to Plaintiff's constitutional challenge. Plaintiff urges this Court to apply the test recently adopted by the Supreme Court of the United States to analyze Second Amendment claims in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111, 213 L.Ed.2d 387. In *Bruen*, the United States Supreme Court held:

[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

*Id.* at 2126. Thus, so Plaintiff argues, once Plaintiff has demonstrated that the Columbus City Firearm Ordinances are covered by the plain text of the Ohio Constitution, the burden shifts to the Defendants to show that the regulation is consistent with the Nation's historical tradition of firearm regulation.

Defendants, on the other hand, urge this Court to apply the test adopted by the Supreme Court of Ohio in *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163, 164 (1993). In *Arnold*, the Supreme Court of Ohio held that "Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. However, this right is not absolute." *Id.* at paragraph two of the syllabus. The Supreme Court of Ohio further noted that "[t]o meet the divergent needs and evolving conditions of society, legislation pursuant to the police power needs to be enacted. Almost every exercise of this authority will, in most if not all instances, interfere with a personal or collective liberty. Therefore, the test is one of *reasonableness*." (Emphasis added.) *Id.* at 47. "reasonable gun control legislation is that which is fair, proper, moderate, suitable under the circumstances and not excessive" *Id.* at fn 12.

Though *Arnold* is the keystone case interpreting the Ohio Constitution's right to keep and bear arms, Plaintiff argues that the analysis is outdated given the change to the landscape of Second Amendment jurisprudence in the 30 years since *Arnold* was decided. Whether *Bruen* and its antecedents require a reexamination of *Arnold* is an issue for the Supreme Court of Ohio to address. "[T]he authority to examine previous decisions is vested in 'a supreme court,' not lower courts." *Hoeflinger v. AM Mart, LLC*, 6th Dist. No. L-16-1124, 2017-Ohio-7530, 96 N.E.3d 1247, ¶ 37. Pursuant the doctrine of stare decisis, this court is bound to follow a decision of the Supreme Court of Ohio.

Applying, therefore, the *Arnold* framework to this case, this Court concludes that Plaintiff has not shown a substantial likelihood of success on the merits. The *Arnold* Court recognized "the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation." *Arnold* at 38. Thus, Plaintiff bears the heavy



burden of establishing the Columbus City Firearm ordinances are unconstitutional beyond a reasonable doubt. *Id.*

Plaintiff argues that the Columbus City Firearm Ordinances are unreasonable under the *Arnold* standard because “[t]he Criminal-Storage Ordinance criminalizes law-abiding citizens for failing to find adequate hiding places for their firearms such that not even teenage children know how or where to access them. C.C.C. 2323.191 And the ordinance criminalizes citizens even where no minor ever accesses a firearm. *Id.* Finally, the Criminal-Storage Ordinance virtually destroys an individual’s ability to use a firearm in the home for protection, if minors live in or visit the home. As for the Ban on 30-Round Magazines, this ordinance essentially bans one of the most popular recreational and home-defense rifles.” Plaintiff’s Closing Argument in Support of Its Motion for A Preliminary Injunction at p. 4. In a full trial on this matter, Plaintiff *may* be able to prove these statements true. But as of now, Plaintiff has presented no evidence to support them. Plaintiff’s repeated claim that the Columbus City Firearms Ordinances effectively ban AR-15 rifles is actually at odds with the limited evidence presented, which indicated that such rifles could operate with a magazine that holds less than 30 rounds. See testimony of John Gripshover.

Ultimately, at this early stage of litigation, Plaintiff has not demonstrated a likelihood that they will be able to prove that the Columbus City Firearm Ordinances run afoul of the reasonableness test established by *Arnold* and its progeny. The Ordinances do not constitute a ban on all, or even any particular type of weapons. They do not constitute a ban on carrying or using said weapons for self-defense. The Ordinances limit certain weapon accessories (i.e. large capacity magazines) and how weapons can be stored. Plaintiff may be able to ultimately show such restrictions violate the Ohio Constitution but has not demonstrated by clear and convincing evidence that they are likely to be able to do so at this point in time.

2. Will the plaintiff suffer irreparable injury if the injunction is not granted?

"[W]here a party's likelihood of success on the merits is low, there must be a high likelihood of irreparable harm to justify injunctive relief. '[W]hat plaintiff must show as to the degree of irreparable harm varies inversely with what plaintiff demonstrates as to its likelihood of success on the merits.' " *AIDS Taskforce of Greater Cleveland v. Ohio Dept. of Health*, 8th Dist. No. 105971, 2018-Ohio-2727, 116 N.E.3d 874, ¶ 23, quoting *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 12, 684 N.E.2d 343 (8th Dist.1996). As this Court has determined that Plaintiff has not shown a high likelihood of success on the merits, it is all the more imperative that Plaintiff demonstrate a irreparable injury if the injunction is not granted. Plaintiff has failed to do so.

Plaintiff assumes the mantle of all Ohio Citizens and seeks to protect their constitutional rights. Defendants dispute Plaintiff's standing to step into the shoes of the citizens of Ohio. Assuming for the sake of argument that Plaintiff is able to stand-in for the citizens of the State of Ohio in this manner, Plaintiff has still failed to demonstrate irreparable injury.

"A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well." *Magda v. Ohio Elections Comm.*, 10th Dist. No. 14AP-929, 2016-Ohio-5043, 58 N.E.3d 1188, ¶ 38, citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.2001). But to stand on this proposition, there must be a finding that a constitutional right has been threatened or impaired, thus tying this prong to the likelihood of success on the merits: "Whether Plaintiffs will suffer irreparable harm depends entirely on whether the challenged statute is constitutional. If constitutional, then Defendants are correct in stating that Plaintiffs have lost no constitutional protection. If unconstitutional, then Plaintiffs are correct in stating they will be irreparably harmed if this statute were allowed to take effect. Thus, if Plaintiffs can show a substantial likelihood of success on the merits of their claim, they also will have shown that they are about to suffer immediate irreparable harm..." *United Auto Workers, Local Unions 1112 & 402, Region 2B*

*v. Blackwell*, Ohio Com.Pl. No. 05CVH-03-2553, 2005 WL 991248, \*1. As discussed above, Plaintiff has not shown a substantial likelihood of success on the merits, therefore there is no presumption of irreparable injury.

Plaintiff further argues that Defendant City of Columbus failed to make any provisions for the implementation of the Columbus City Firearms Ordinances to allow for the orderly disposal or dispossession of property that may violate the Ordinances, such as magazines that exceed the 30-round limit. While it is true that there are no such provisions in the Ordinances, residents of the City may make arrangements to store such magazines outside of the City and need not dispose of their property during the pendency of this case. Moreover, even if residents are forced to dispose of magazines, and the Plaintiff is eventually successful in this suit, the harm suffered would not be irreparable. Restitution for such actions would be possible.

Ultimately, Plaintiff has shown no irreparable injury sufficient to warrant the granting of a preliminary injunction in this matter.

3. *Will any third parties will be unjustifiably harmed if the injunction is granted?*

If Plaintiff is presumed to be acting on behalf of all citizens of Ohio, then their argument for direct irreparable harm is the same as their argument regarding unjustifiable harm to third parties. Those arguments are addressed above. To the extent Defendants present 'third parties' as those who will be harmed by actions the Columbus City Firearm Ordinances are designed to prevent while the Ordinances are enjoined, any such argument is speculative and best.

Neither party, therefore, has presented compelling evidence on harm to third parties, even given their differing views as to who constitutes a 'third party'. The burden, however, is with the party moving for the preliminary injunction. Thus, lack of evidence weighs against the Plaintiff.

4. *Will the public interest be served by the injunction?*

Courts have recognized that “it is always in the public interest to prevent violation of a party’s constitutional rights.” *Miller v. City of Cincinnati*, 709 F.Supp.2d 605, 627 (S.D. Ohio 2008), see also *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 829. But like the other factors considered in this matter, this axiom turns on whether or not is there actually a violation of constitutional rights. As discussed above, Plaintiff has not presented clear and convincing evidence that they are likely to show a violation of constitutional rights under the *Arnold* test. Therefore, the Court cannot presume that an injunction is in the public interest. The burden is on Plaintiff to demonstrate that the injunction is in the public interest and Plaintiff has not done so.

### **Conclusion**

The Court must balance the evidence presented on four factors to determine whether the issuance of a preliminary injunction is justified. *McHenry* at ¶ 21. In this matter, the Court finds that the Plaintiff has not established by clear and convincing evidence that there is a substantial likelihood that Plaintiff will prevail on the merits. Plaintiff’s likelihood of success may be greater if the Court were to adopt the analytical framework proposed by Plaintiff, but *stare decisis* dictates that this Court apply the analytical framework for the Ohio Constitution’s right to keep and bear arms that has been adopted by the Ohio Supreme Court, even if there have been changes in federal Second Amendment caselaw. Under the Ohio Supreme Court’s current framework, the Plaintiff has not shown a likelihood of success on the merits.

The Court finds that Plaintiff has not shown that Plaintiff, as a stand-in for the citizens of the State of Ohio, will suffer irreparable injury if the injunction is not granted. Plaintiff’s arguments in this regard mostly relate to presumed irreparable injury if there is a violation of the citizens’ constitutional rights. But Plaintiff has not shown that

they will be likely to establish a violation of constitutional rights under the Ohio Supreme Court's current framework, so this Court cannot presume irreparable harm.

The Court finds that Plaintiff has not shown that no third parties will be unjustifiably harmed if the injunction is granted. As with the Plaintiff's argument regarding direct irreparable injury, the arguments regarding harm to third parties is based on the assumption of a constitutional violation in this case, which Plaintiff has not shown. No other evidence was presented in this matter.

The Court finds that Plaintiff has not shown that the public interest will be served by the injunction. The Court may presume the injunction would be in the public interest if the injunction were to prevent a likely constitutional violation, but as Plaintiff has not shown a likely constitutional violation, the Court cannot make such an assumption.

Accordingly, as Plaintiff has not demonstrated by clear and convincing evidence that it is entitled to a preliminary injunction in this matter, Plaintiff's motion for a preliminary injunction is denied. This matter will be set for a case management conference to set a schedule to move forward on the matter of a permanent injunction by separate court order.

IT IS SO ORDERED.

  
JUDGE RICHARD E. BERENS

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